

**THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Applicant(s): Kruik et al.  
Appl. No.: 10/820,880  
Conf. No.: 9267  
Filed: April 9, 2004  
Title: COATING AND COMPOSITE FROZEN CONFECTIONS  
Art Unit: 1761  
Examiner: Tran Lien, Thuy  
Docket No.: 112701-584

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

**APPELLANTS' REPLY BRIEF**

Sir:

**I. INTRODUCTION**

Appellants submit Appellants' Reply Brief in response to the Examiner's Answer dated November 14, 2007 pursuant to 37 C.F.R. § 41.41(a). Appellants respectfully submit the Examiner's Answer has failed to remedy the deficiencies with respect to the Final Office Action dated February 7, 2007 as noted in Appellants' Appeal Brief filed on August 2, 2007 for at least the reasons set forth below. Accordingly, Appellants respectfully request that the rejections of pending Claims 1 and 6-21 be reversed.

**II. THE REJECTION OF CLAIMS 1 AND 6-21 UNDER 35 U.S.C. § 103(a) SHOULD BE REVERSED BECAUSE THE EXAMINER HAS NOT ESTABLISHED A PRIMA FACIE CASE OF OBVIOUSNESS WITH RESPECT TO THE CITED REFERENCE**

Appellants respectfully request that the Board reverse the rejections of Claims 1 and 6-21 under 35 U.S.C. §103(a) because there exists no reason why the skilled artisan would modify *Hegadorn* to arrive at the presently claimed subject matter. Moreover, *Hegadorn* fails to disclose or suggest all of the claimed elements of the present invention, as admitted by the Examiner.

- a. There exists no reason why the skilled artisan would modify *Hegadorn* to arrive at the presently claimed subject matter as *Hegadorn* teaches away from same

Appellants respectfully submit that there exists no reason why the skilled artisan would modify *Hegadorn* to arrive at the presently claimed subject matter. Independent Claim 1 recites, in part, a biscuit mass comprising a mixture consisting essentially of particles of baked biscuit and at least one fat, the mixture contains 20 to 60% by weight of the biscuit particles and 40 to 80% by weight of the fat. Independent Claim 16 recites, in part, a process for manufacturing a composite frozen confection comprising bringing an ice confectionery and a biscuit mass consisting essentially of particles of baked biscuit and at least one fat into contact to form the composite confection.

An advantage of an embodiment of the present invention is to provide a biscuit mass that looks like a biscuit at -10 °C or below, but is liquid from 15 °C or above, and which can be processed with an ice confectionery as a coating, core or inclusion. In addition, the claimed invention provides the advantage that there is no emulsion of the fat with an aqueous phase containing sugar and no dramatic increase of the viscosity of the mass as in the case, for example, where fat is mixed with water and sugar. This enables the liquid formulation of the present claims to be processed in regular ice confection coating or injection operations. If anything, *Hegadorn* teaches away from the claimed invention.

The Examiner asserts that Appellants' arguments that *Hegadorn* teaches away from the present invention are not persuasive because *Hegadorn* discloses an amount of crumbs that falls within Appellants range of biscuit particles, the binder component is optional and that it would have been obvious to vary the fat content to alter the taste, texture, consistency and fat content of the product. See, Examiner's Answer, page 5, lines 13-22. However, Appellants respectfully submit that, in order for *Hegadorn's* mix to be suitable for baking, *Hegadorn* teaches using a higher amount of pastry crumbs, a lower amount of fat and preferably a binder (to keep food components together), which distinguishes it from the present invention. See, *Hegadorn*, page 5, lines 8-12.

For example, the Examiner asserts that "[t]he amount of crumbs in the *Hegadorn* mixture is 60-90%; this range falls within the one claimed." See, Examiner's Answer, page 3, line 24. However, the range disclosed in *Hegadorn* is clearly higher than the range disclosed by the present claims. Moreover, the higher range of baked crumbs in *Hegadorn* directly affects the structural stability of the crust so that the crust will not readily crumble and/or fall apart in the same way as a cracker crumb crust. See, *Hegadorn*, page 4, lines 16-25. This advantage of *Hegadorn*, however, teaches away from the presently claimed subject matter wherein the biscuit mass cannot have a biscuit particle content that is too high such that the biscuit particle content may not perform as intended, e.g., it may not look like a biscuit at -10 °C or below, but will be liquid from 15 °C or above.

With respect to the binder component, the Examiner asserts that the binder component is optional. See, Examiner's Answer, page 5, lines 18-19. However, *Hegadorn* mentions in at least four locations in the specification that the pre-baked crust is preferably formed with an edible binder, which aids in formation of a firm crust. Therefore, even if *Hegadorn* discloses that it is possible to form a pre-baked crust without the use of an edible binder, *Hegadorn* teaches that a pre-baked crust without an edible binder will inherently result in a pre-baked crust that is not as firm as a crust having an edible binder. As a result, a pre-baked crust without an edible binder would be more susceptible to crumbling and falling apart. This is in direct contrast to the present invention, which does not even include a binder material.

The Examiner also asserts that "[a]s to the amount of fat, the rejection takes the position that it would have been obvious to vary the fat content to alter the taste, texture, consistency and fat content of the product." See, Examiner's Answer, page 5, lines 19-21. However, Appellants

respectfully assert that most food products contain fat, and that the Examiner's broad assertion that varying the levels of fat in a food product would have been obvious operates to effectively prevent Appellants from claiming any food product having any fat content. As such, Appellants respectfully submit that any claims to food products having any fat content could be arguably rendered obvious over another reference disclosing a food product having a fat content.

Moreover, Appellants respectfully submit that the fat content of *Hegadorn* (7-25% by weight) is significantly lower than that required, in part, by the present claims (40-80% by weight). Although the Examiner asserts that "[w]hile *Hegadorn* discloses 7-25% fat, there is no disclosure that the amount of fat cannot be higher," see, Examiner's Answer, page 6, lines 5-6, Appellants respectfully submit that there is no disclosure that the fat content of *Hegadorn* can be higher. In fact, Appellants respectfully submit that at no place in the disclosure does *Hegadorn* disclose or even suggest a fat content greater than 25%. Moreover, Appellants also submit that the range of fat content of *Hegadorn* was claimed because the claimed range was found to be the most effective range for preparing the pre-baked crust. In contrast, however, Appellants respectfully submit that the skilled artisan would appreciate that significantly changing the fat content of *Hegadorn* would also significantly change the resulting product of *Hegadorn*. As such, the skilled artisan would have no reason to modify the fat content of *Hegadorn* to arrive at the presently claimed subject matter.

Accordingly, *Hegadorn* is directed toward a product in an entirely different field of invention having different purposes and objectives and therefore teaches away from the combination. As a result, if the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modifications.

- b. *Hegadorn* fails to disclose or suggest every limitation of the presently claimed subject matter, as admitted by the Examiner

Appellants also respectfully submit that, even if modified, *Hegadorn* fails to disclose each and every limitation of the presently claimed subject matter. For example, *Hegadorn* fails to disclose or suggest a biscuit-like mass comprising a mixture consisting essentially of particles of baked biscuit and 40 to 80% by weight of fat as required, in part, by Claim 1. *Hegadorn* also

fails to disclose or suggest a process for manufacturing a composite frozen confection comprising bringing an ice confectionery and a biscuit mass consisting essentially of particles of baked biscuit and at least one fat into contact to form the composite confection as required, in part, by Claim 16.

In fact, the Examiner even admits that “[t]he patent does not specifically disclose biscuit, the properties as recited in claim 1, the amount of fat claimed, the property of the fat, the inclusion of other ingredients in the mixture of baked pastry and fat, the amount of overrun as in claims 9-10, the making of the confection as in claims 11, 17, the inclusion of other material in the ice confection as in claims 12-14, the form of the confection as in claim 15 and the mixing temperature as in claim 16.” See, Examiner’s Answer, page 3, line 24-page 4, line 3. Moreover, Appellants note that the Examiner does not rebut Appellants’ assertion that *Hegadorn* fails to disclose or suggest a biscuit-like mass comprising a mixture consisting essentially of particles of baked biscuit and 40 to 80% by weight of fat as required, in part, by Claim 1.

Instead, the Examiner takes issues with Appellants’ assertion that *Hegadorn* also fails to disclose or suggest a process for manufacturing a composite frozen confection comprising bringing an ice confectionery and a biscuit mass consisting essentially of particles of baked biscuit and at least one fat into contact to form the composite confection as required, in part, by Claim 16. In response, the Examiner points out that *Hegadorn* teaches that the crust mixture is used to make frozen desserts. See, Examiner’s Answer, page 7, lines 2-4. However, as admitted by the Examiner, *Hegadorn* fails to disclose the biscuit mass of the present invention, let alone the biscuit mass of the present invention that is used as a coating, core or inclusion as is also required, in part, by the present claims. As such, Appellants respectfully submit that *Hegadorn* fails to disclose or suggest a process for manufacturing a composite frozen confection comprising bringing an ice confectionery and a biscuit mass (as described and claimed by Appellants) consisting essentially of particles of baked biscuit and at least one fat into contact to form the composite confection as required, in part, by Claim 16.

For at least the reasons discussed above, the cited reference does not teach, suggest, or even disclose all of the elements of Claims 1 and 6-21, and thus, fails to render the claimed subject matter obvious for at least these reasons. Therefore, Appellants respectfully submit that Claims 1 and 6-21 are novel, nonobvious and distinguishable from the cited reference and are in condition for allowance.

Accordingly, Appellants respectfully request that the obviousness rejection with respect to Claims 1 and 6-21 be reconsidered and the rejection be withdrawn.

**IV. CONCLUSION**

For the foregoing reasons, Appellants respectfully submit that the Examiner's Answer does not remedy the deficiencies noted in Appellants' Appeal Brief with respect to the Final Office Action. Therefore, Appellants respectfully request that the Board of Appeals reverse the obviousness rejection with respect to Claims 1 and 6-21.

No fee is due in connection with this Reply Brief. The Director is authorized to charge any fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-584 on the account statement.

Respectfully submitted,

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Dated: January 11, 2008